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(3)

Supreme Court, U.S.
FILED
MAR 24 2011
OFFICE OF THE CLERK

No. 10-889

IN THE

Supreme Court of the United States

WES BERTALAN *et al.*,
Petitioners,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 24, 2011

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C 20002

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I. The New Legal Standard Adopted by the Ninth Circuit for the Market Participant Exemption Requires This Court's Review

1. Respondents' opposition brief is remarkable in that it makes almost no effort to defend the expansive new test adopted by the Ninth Circuit for whether a state is acting as a market participant exempt from the preemptive effects of federal law. Instead, the crux of Respondents' argument is that their conduct would be lawful even if the Ninth Circuit had adopted a narrower test. But this does not change the fact that the Ninth Circuit *did* adopt a new legal standard that dramatically expands the breadth of the market participant exemption. This

case is a suitable vehicle for reviewing the propriety of that standard, because the result in this case will be different if this Court adopts a narrower, more appropriate test for market participation.

It is uncontested that the Ninth Circuit in this case held, as a matter of law, that: (1) the market participant exemption requires only that a state action be for "efficient procurement" or "narrow in scope," and not both (App. 18a); (2) "efficient procurement" encompasses non-pecuniary, policy objectives (App. 21a-22a); (3) "narrow in scope" encompasses rules of general application, and does not require that the state action be tailored to a particular project (App. 27a-28a); and (4) analogous private conduct need not be lawful for a state to act as a market participant (App. 24a-25a). This legal standard is now binding law throughout the expanse of the Ninth Circuit.

It is this new legal standard for market participation that conflicts with the legal standards delineated by this Court and several circuit courts of appeal. (Pet. 6-12).[1] And it is this expansive legal standard

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[1] Respondents' claim that the Second, Third, and Fifth Circuits did not adopt conjunctive two-part tests for market participation that differ from the disjunctive test adopted by the Ninth Circuit here. (Opp. Br. 7). This claim cannot survive a review of those decisions. Compare *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (city acted as market participation when both prongs of test were satisfied); *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 215-17 (3d Cir. 2004) (same); *Healthcare Ass'n v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (state did not act as market participant when one prong of test was not satisfied, implying that satisfaction of both prongs is required). Respondents simply ignore this Court's recitation of a conjunctive standard for market participation in *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008).

that threatens to undermine the supremacy of federal law. (Pet. 13-16). Thus, it is with respect to this legal standard that the Court's guidance is needed, both to resolve this conflict of authority and to establish a proper test for market participation.

2. Adopting a narrower and proper test for market participation will also change the outcome of this case. If "efficient procurement" is held to require a state interest in efficient procurement—instead of encompassing any policy objective that "serves the state's purposes," as the Ninth Circuit has held (App. 21a)—the District could not satisfy this requirement on remand, as there is undisputed evidence that District officials did not undertake any analysis to determine if the PSA would be economically beneficial. If market participation is properly held to require that a state action "'be specifically tailored to one particular job,'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008) (citation omitted), the District's PSA—which is a rule of general application that governs all District construction projects financed by Ballot Measure E that cost more than $200,000—cannot survive scrutiny. If it is held relevant whether "analogous private conduct would be permitted," *Building & Constr. Trades Council v. Associated Builders & Contractors ("Boston Harbor")*, 507 U.S. 218, 231 (1993), the District could not be considered a market participant because private purchasers of construction services cannot enter into agreements like the PSA under §§ 8(e) and (f) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(e) and (f). (*See* Pet. 17-20). Accordingly, this case is an appropriate vehicle for reviewing the propriety of the Ninth Circuit's expansive new test for the market participant exemption.

II. The Ninth Circuit's Decision That the NLRA Does Not Preempt Public Entities from Enforcing Union Subcontracting and Pre-Hire Agreements That Would Be Unlawful Under the NLRA Undermines the Integrity of Federal Labor Policy, and Should Be Reviewed by This Court

1. In *Boston Harbor*, this Court held that "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a [union] prehire agreement, a public entity as purchaser should be permitted to do the same." 507 U.S. at 231.[2] Other than nakedly asserting that the law is unsettled, Respondents make no attempt to refute that private purchasers could not lawfully enter into the PSA under §§ 8(e) and (f) of the NLRA. (Pet. 17-18). Nor do Respondents attempt to distinguish this Court's holding that union subcontracting agreements entered into outside of a representational relationship, as the PSA is here, are repugnant to congressional intent to limit top-down organizing pressures under the NLRA. *See Connell Constr. Co. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616, 631-33 (1975); (Pet. 19-21).

Respondents inconsistently assert that it does not matter if the District's conduct is in "technical compliance" with the NLRA, so long as it is "utilizing

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[2] Respondents' argument that the NLRA does not apply to political entities was directly addressed by this Court in *Boston Harbor*—while "the State is excluded from the definition of 'employer' under the NLRA . . . the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections." 507 U.S. at 231. Confoundedly, Respondents themselves quote this passage in their brief, and then proceed to ignore it. (Opp. Br. 12-13, fn. 9).

precisely the kind of pre-hire agreements Congress authorized to accommodate [conditions in the construction industry]." (Opp. Br. 12-13). This is nonsensical. How can an agreement unlawful under §§ 8(e) and (f) of the NLRA be "precisely the kind of prehire agreements Congress authorized?" (*Id.*). What Congress authorized is stated in the NLRA's language. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes"). Moreover, *Connell* makes clear that union subcontracting agreements with strangers, such as the PSA here, are not agreements that Congress intended to be lawful under the NLRA. 421 U.S. at 631-33; (*see* Pet. 19-20). The PSA is offensive both to the text and spirit of the NLRA, and thus is not the type of state interference with labor relations that Congress intended to escape federal preemption under that Act.

2. Respondents attempt to minimize the importance of this issue by claiming that, if this Court holds that the NLRA preempts public purchasers from entering into union pre-hire agreements, public purchasers will circumvent this restriction by "retain[ing] a 'middleman' to negotiate and execute the agreement." (Opp. Br. 15). To the contrary, it is unlikely that public purchasers will seek a union pre-hire agreement except pursuant to an agreement with the union.[3] This is true not only because public pre-hire

[3] A subcontracting agreement between a public purchaser and union in which the purchaser agreed to only do business with a general contractor (i.e., "middleman") that negotiates and executes a union agreement would itself be preempted by the NLRA, as this type of subcontracting agreement is unlawful under § 8(e) of the NLRA.

agreements are generally the result of union influence on the public entity (*see* Pet. 22 n.16), but also because rational public entities will not blindly command a "middleman" to enter into a binding agreement that governs their construction projects without first negotiating the substantive terms of that agreement with the union.

In any case, the possibility that unilateral actions by public entities may escape preemption does not diminish the importance of the issue presented. Again, the pressing problem is that *unions* are circumventing the NLRA's prohibitions on secondary economic pressure by accomplishing through public entities what Congress barred them from accomplishing through private entities. (Pet. 20-22). Here, the Union is using the District to do precisely what *Connell* held to be unlawful under the NLRA when done through a private entity—applying top-down organizing pressure on contractors and their employees via a "stranger" with which the union lacks a representational relationship. 421 U.S. at 631-32.

Accordingly, accepting review in this case and holding that the NLRA preempts public entities from entering into union agreements unlawful under the Act will serve to protect the integrity of federal labor policy. This is the purpose of preemption under the NLRA. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

III. The Court Should Accept Review Because This Case Is Not Moot

Respondents argue in a footnote that this case is moot because the PSA has expired. The lower court properly rejected this argument (App. 7a-13a), as Respondents have not met their "heavy burden" of establishing mootness. *County of Los Angeles v.*

Davis, 440 U.S. 625, 631 (1979) (citation omitted). First, Respondents have failed to establish that Petitioners will not be subjected to a policy akin to the PSA in the future. Second, the three-year duration of the PSA was necessarily too short to allow for full litigation before it expired. Thus, this case falls within the exception to the mootness doctrine because it is capable of repetition and yet evading review. *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). "To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 191-92 (2000).

CONCLUSION

The Ninth Circuit's adoption of a new legal standard for the market participant exemption warrants review by this Court. The standard not only is inconsistent with the precedents of this Court and others, but its sheer breadth threatens to swallow the general rule of federal preemption delineated in the Supremacy Clause to the United States Constitution. The petition for certiorari should be granted.

Respectfully submitted,

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March 24, 2011